SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 19

BAXTER N. FOUST, ADMINISTRATOR, ETC., PETITIONER,

vs.

MUNSON STEAMSHIP LINES, DEBTOR IN REORGANIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of MUNSON STEAMSHIP LINE, Debtor;

BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Appellant

STATEMENT

1934

Feb. 1. Summons and complaint filed.
Feb. 7. Answer of defendant filed.
June 11. Petition of Munson Steamship Line for reorganization under Section 77b filed.
July 13. Adjudication of insolvency; restraining order granted and appointment of trustees filed.

1935

Jan. 26. Notice of motion to modify restraining order to permit Foust, administrator, to prosecute suit filed.
Jan. 31. Opinion denying motion to modify restraining order filed.
Mar. 26. Order denying motion to vacate stay filed.
Apr. 5. Petition of Foust, administrator, for leave to appeal allowed and filed.
Apr. 5. Citation on appeal issued and filed.
Apr. 9. Bond on appeal approved and filed.
Apr. 15. Application to Circuit Court of Appeals for leave to appeal filed.
Apr. 29. Opinion granting leave to appeal filed.
May 6. Order of Circuit Court of Appeals allowing appeal filed.
May 8. Consent and order extending time of appellant to procure settlement of record on appeal to June 10, 1935.
May 13. Application to Circuit Court of Appeals for leave to file supplemental assignments of error filed.
May 21. Order allowing filing of supplemental assignments of error filed.
May 22. Supplemental assignments of error filed.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Plaintiff,

against

MUNSON STEAMSHIP LINE, Defendant

COMPLAINT

Plaintiff brings this suit against the defendant at common law under the Jones Act of Congress for the benefit of the surviving father of decedent, as next of kin, and alleges:

I

That on December 30th, 1933, Baxter N. Foust was duly appointed administrator of the goods, credits and chattels which were of Coy E. Foust, deceased, by the Superior Court of Rowan County, State of North Carolina, and that the said Baxter N. Foust duly qualified as such administrator and is now the personal representative of said estate.

II

That at all times hereinafter mentioned the Munson Steamship Line was, and is, a domestic corporation organized and existing under the laws of the State of New York, and having an office and principal place of business in the City, County and State of New York, and within the jurisdiction of this Court.

[fol. 3]

III

That at all times hereinafter mentioned the said defendant owned the merchant steamship "Mundelta".

IV

That at all times hereinafter mentioned the said defendant operated the merchant steamship "Mundelta".

V

That at all times hereinafter mentioned the said defendant manned, equipped and supplied the merchant steamship "Mundelta".

VI

That on February 20, 1932, Coy E. Foust was employed by the said defendant as an ordinary seaman on said steamship "Mundelta".

VII

That on February 20, 1932, said Coy E. Foust was thirty-six years of age, had a life expectancy of 31.07 years and was earning about $47.50 per month and his keep.

VIII

That said Coy E. Foust received fatal injuries on board said steamship "Mundelta" on February 20th, 1932, as hereinafter detailed, at which time said Coy E. Foust was single and unmarried and left as his sole surviving next [fol. 4] of kin his father, Baxter N. Foust, who received contributions and had an expectation of support from his said son, who needed, and now needs, such support. That said father was sixty-six years of age at the time of his son's death, and had a life expectancy of 10.54 years.

IX

That on or about February 20th, 1932, the said steamship "Mundelta" lay at the dock of the Bangor & Aroostook Railroad Company at Searsport, Maine. The top hatches of #1 and #2 holds were on but the 'tween deck hatches of said holds were off or partly off. There was no sufficient light in 'tween decks, either natural or artificial, at the time of the accident hereinafter described, and particularly at said open 'tween deck hatches, nor were there any life lines, guards or rails about said open 'tween deck hatches, nor was there any sign or warning of the open hatch or the danger, or any light to indicate the absent hatch covers.

X

Plaintiff alleges that the said 'tween deck hatch #1 and #2 were not then receiving or discharging cargo; that the top hatches were covered.

XI

Plaintiff alleges that about 8:00 A. M. on the morning of [fol. 5] February 20, 1932, the said Coy E. Foust was at

work in said 'tween decks engaged in the performance of his duties in sweeping or cleaning certain dirt from said 'tween decks at, near or about said hatchways when, on account of the darkness, the absence of rails, the want of warnings, in default of any protection of said opening, the said Coy E. Foust in moving about to perform his duties stepped, walked or fell into said 'tween deck hatch #1 and was precipitated into the lower hold.

XII

That in so falling the said Coy E. Foust sustained fatal injuries and after lingering in conscious pain and suffering until about 8:00 P. M. the same day, died.

XIII

Plaintiff alleges that the death of said Coy E. Foust was proximately caused by the negligence of the defendant, its servants, agents and employees as follows:

a. In not providing said decedent with a reasonably safe place of work.

b. In not having life lines, guards or rails about said open hatch.

c. In not having adequate light about said open hatch.

d. In not having a warning sign of "Open Hatch, D-A-N-[fol. 6] G-E-R", or similar wording, properly illuminated at or near said hatch, as required by custom and as dictated by reasonable prudence.

e. In permitting some of the 'tween deck hatch covers to be and remain off when no work was being done, without protecting such openings.

f. In permitting the top deck hatch to be and remain covered, thereby excluding daylight from entering the 'tween decks.

g. In not furnishing adequate artificial light in 'tween decks about #1 and #2 hatches while said decedent was engaged in work.

h. In ordering said decedent to do and perform work at or near said open 'tween deck hatch when the same was unlighted and unprotected as hereinbefore detailed.

i. In not notifying or warning said decedent of the defects and dangers in and about said 'tween deck hatch.

XIV

Plaintiff sues to recover indemnity for the death of said Coy E. Foust and also damages for his conscious pain and suffering, all for the use and benefit of said decedent's father, Baxter N. Foust, his sole surviving next of kin, his mother having predeceased him, said indemnity and damages amounting to Fifteen Thousand ($15,000) Dollars.

[fol. 7] Count Two

XV

Plaintiff realleges hereunder all the allegations in paragraphs 1 to 10, inclusive, and also from 12 to 14, inclusive, as fully as if herein set forth in extenso.

XVI

Plaintiff alleges that about 8:00 A. M. on the morning of February 20th, 1932, the said Coy E. Foust was at work in said 'tween decks engaged in the performance of his duties in sweeping or cleaning certain dirt from said 'tween decks at, near or about said hatchways when, on account of the darkness, the absence of rails, the want of warnings, in default of any protection of said opening, the said Coy E. Foust in moving about to perform his duties stepped, walked or fell into said 'tween deck hatch #2 and was precipitated into the lower hold.

XVII

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifteen Thousand ($15,000.00) Dollars, together with all costs and disbursements of the action.

Gazan & Caldwell, Attorneys for Plaintiff, One Broadway, Borough of Manhattan, City of New York.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF DEFENDANT.

Defendant, by its attorneys, Tompkins, Boal & Tompkins, answering the complaint herein, alleges upon information and belief:

As to Count One:

First. It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "I", "VII", "VIII" and "XIV" of the complaint.

Second. It denies each and every allegation contained in paragraphs numbered "IX", "X", "XI", "XII" and "XIII" of the complaint.

As to Count Two:

Third. It repeats and realleges each and every allegation [fol. 9] hereinbefore alleged with the same force and effect as though herein repeated at length.

Fourth. It denies each and every allegation contained in paragraph "XVI" of the complaint.

Further Answering, Defendant Alleges:

Fifth. That plaintiff's intestate's employment had certain risks incident thereto, which were obvious and well known to the plaintiff's intestate at all the times of his employment and also when he first entered thereon, and that said risks were assumed by plaintiff's intestate, and that whatever injuries and illnesses plaintiff's intestate received in said employment and which are complained of by him herein, arose from and were caused by said risks, all of which were taken and assumed by plaintiff's intestate at the time he entered upon said employment and during the continuance thereof.

Further Answering, Defendant Alleges:

Sixth. That any injuries sustained or suffered by plaintiff's intestate at the time and place and/or on the occasion

mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the plaintiff's intestate, and not by any negligence or fault or want of care on the part of this defendant. [fol. 10] Wherefore, defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Tompkins, Boal & Tompkins, Attorneys for Defendant, Office & P. O. Address, 116 John Street, Borough of Manhattan, City of New York.

In United States District Court, Southern District of New York

No. 59,923

In Proceedings for Reorganization of a Corporation

In the Matter of Munson Steamship Line, Debtor

Petition of Munson Steamship Line for Reorganization

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of Munson Steamship Line, a corporation organized and existing under the laws of the State of New [fol. 11] York (hereinafter referred to as the Debtor"), under Section 77B of an act entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto (hereinafter referred to as the "Bankruptcy Act"), respectfully shows:

First. That the debtor is a corporation duly organized and existing under the laws of the State of New York, and a citizen and resident of said State, and is a commercial corporation and is not a municipal, railroad, insurance or banking corporation, or a building and loan association; that during the six months' period immediately preceding the filing of this petition and for many years prior thereto the debtor has had, and now has its principal place of business and also its principal executive and operating offices in

the Borough of Manhattan, in the City of New York, New York, in the Southern District of New York.

Second. That the nature of the business of the debtor is the ownership and operation of freight and passenger ships in foreign and coastwise trade, together with auxiliary enterprises such as wharves, warehouses, towboats, lighters, etc. These activities are carried on either directly or through subsidiaries. In addition, through subsidiaries, also the debtor owns improved real estate in New York City, and hotel and allied properties in Nassau, Bahamas. The debtor owns and/or operates the following freight and/or passen-
[fol. 12] ger ships: Munalbro, Mundelta, Munplace, Munsomo, Walter D. Munson, Muncove, Munmotor, Munrio, Munizla, Munloyal, Munorleans, Munlisto, Southern Cross, American Legion, Pan America, Western World, Muntropic, Muneric, Munardan, Rajah, Mundolphin, Mundixie, Munbeaver and Munmystic, and controls through stock ownership the fol-owing subsidiary companies: Munson Building Corporation, Bahamas Hotel Company, Limited, Munaires Steamship Corporation, Munindies Steamship Corporation. Munalbro Steamship Corporation, Mundelta Steamship Corporation, Munisla Steamship Corporation, Munplace Steamship Corporation, Munrio Steamship Corporation, Munsomo Steamship Corporation, Munargo Steamship Corporation, Caibarien Transport Company, Crossburn Steamship Company, Ltd., Munorway Steamship Corporation, Bahamas Golf Course, Limited, Hotel Nassau Company, Limited, The New Colonial and Saratoga Transportation Company, Limited, Compania Maritima Cubana, Munson Inland Water Lines, Inc., and 67 Wall Street Restaurant Corporation. Additional ships are owned by various of the aforesaid subsidiary companies.

Third. A brief description of the assets, liabilities, capital stock and financial condition of the debtor is as follows:

The assets, liabilties and capital stock of the debtor are set forth in the tentative and preliminary balance sheet of the debtor as of March 31, 1934 (being the latest available balance sheet), attached hereto as Exhibit "A" and made [fol. 13] a part hereof. No changes in the debtor's condition have occurred since that date other than through the usual course of business, except as herein set forth.

As shown by the balance sheet aforesaid, the assets of the debtor consist of: (1) Steamers, wharves, warehouses,

etc., less reserve for depreciation, $6,942,242.44; (2) investments in subsidiary and affiliated companies, $8,628,326.64; (3) good-will and other intangibles, $557,751.00; (4) deferred charges, $345,490.80; (5) cash on hand and in banks, $65,883.26; (6) receivables, less reserve for doubtful accounts, $701,471.00; (7) stores and supplies, $260,936.06; (8) prepaid insurance, $329,613.74; (9) securities and miscellaneous investments, less reserve, $164,791.43; (10) interest in default on bonds and deficit, $565,274.55; or a grand total of $18,561,780.92.

Similarly, the liabilities of the debtor consist of: (1) notes, drafts, accounts and vouchers payable, $2,934,503.54; (2) due to subsidiary and affiliated companies, $807,636.80; (3) prepaid Passage Collections, $88,934.35; (4) accrued interest in default on bonds, $274,905.00; (5) reserves, $839,745.38; (6) deferred credits, etc., $96,629.80; (7) long term notes payable, $2,956,789.56; (8) bonded indebtedness, $6,852,500.00; (9) capital stock, $3,555,500.00; (10) excess of revenues over expense, open voyage accounts, $154,636.49; or a grand total of $18,561,780.92.

Although said balance sheet, Exhibit "A", shows cash on hand and in banks as of March 31, 1934, in the amount of $65,883.26, that amount has been largely depleted since that date so that the cash now on hand and in banks amounts to not more than $10,000.

[fol. 14] The capital stock of the debtor, issued and outstanding, consists of 11,045 shares of 6% Cumulative Preferred Stock of the par value of $100 per share, carried on the balance sheet at $1,104,500, and 125,100 shares of common stock, without par value, carried on the balance sheet at $2,451,000.

The debtor's financial condition is as follows:

(1) The debtor is indebted to the United States Government under four First Preferred Ship Mortgages aggregating $2,565,000, of which a principal amount of $820,800 is now past due.

(2) The debtor is indebted to divers and sundry persons holding its 6% Secured Gold Bonds issued and now outstanding in the aggregate principal amount of $4,354,000 under its Mortgage and Deed of Trust to Guaranty Trust Company of New York, (successor trustee) dated as of January 1, 1929. The debtor defaulted in the payment of the instalment of interest aggregating $130,620.00 which be-

came due on said bonds on January 1, 1934, and such default continued for a period of thirty days and still continues, under which circumstances the trustee may, and upon request of the requisite percentage of bondholders must, declare the principal of the outstanding bonds to be due and take appropriate proceedings under said Mortgage and Deed of Trust to foreclose its lien and enforce payment of said bonds. Any holder of coupons is now entitled to sue the debtor for recovery of the amount of such coupons.

[fol. 15] (3) The debtor is indebted to divers and sundry persons holding its 6½% Gold Debenture Bonds issued and now outstanding in the aggregate principal amount of $2,430,000 under its Indenture to City Bank Farmers Trust Company (successor trustee) dated as of January 1, 1929. The debtor defaulted in the payment of the instalment of interest aggregating $79,975.00, which became due on said Debentures on April 1, 1934, and such default continued for a period of thirty days and still continues, under which circumstances the trustee may, and upon request of the requisite percentage of debenture holders must, declare the principal of the outstanding debentures to be due and take appropriate proceedings under said Indenture to enforce their payment. Any holder of coupons is now entitled to sue the debtor for recovery of the amount of such coupons.

(4) The debtor is indebted to divers and sundry persons on the other obligations and notes and accounts payable aggregating upwards of $3,000,000.00 a substantial amount of which is now past due.

By reason of the continuing depression in the Shipping Industry the consolidated gross earnings of the shipping business of the debtor have declined from $22,963,412 in the fiscal year ended June 30, 1929, to $8,380,390 in the fiscal year ended June 30, 1933. Although far-reaching and rigid economies have been put into effect by the debtor during the past two years which have resulted in a drastic reduc-[fol. 16] tion in operating expenses, they have not been sufficient to solve the financial problems of the debtor. The debtor is without funds to pay all or any substantial part of the amounts set forth above as owing by it, and on information and belief alleges that it had and now has no means of borrowing or otherwise procuring such funds.

Fourth. That there is pending in the New York Supreme Court in Kings County a proceeding by G. & B. Marine Repair Company against the debtor, in which the G. & B. Marine Repair Company, alleged to be a creditor of the debtor, sets forth allegations as to the manner in which the debtor conducts its business and affairs, alleges that the fair value of the assets of the debtor is largely in excess of its indebtedness but that it is unable to obtain sufficient funds to meet its current liabilities, and prays for the appointment of a receiver or receivers by the Court, with the usual powers of receivers in such cases, to preserve the properties and business of the debtor for the benefit of all its creditors and stockholders, and to order a sale of its property and the administration of the proceeds of such sale for a like purpose. This proceeding was commenced on November 29, 1933, but the time to answer the complaint has been extended from time to time by stipulation and no answer has yet been filed.

Fifth. That by reason of the matters and things heretofore alleged, certain of the creditors of the debtor have [fol. 17] brought suit against the debtor on their claims, and other creditors of the debtor are pressing their claims for payment and the debtor apprehends that they will forthwith bring suit thereon and libel or attach the vessels and other property of the debtor, enter thereon and place a marshal, sheriff or other officer in possession thereof, and in divers other manners enforce their respective claims. Such action on the part of such creditors will, as the debtor believes, result in judgments, libels, executions and seizures by marshals, sheriffs and other like officers and in forced sales of the property of the debtor, with the necessary consequence that the debtor will be compelled to cease the conduct of its business. Any such action on the part of such creditors will interfere with and obstruct the business of the debtor, will cause the suspension of such business and will cause great and irreparable injury and loss to the debtor and to all of its creditors.

The debtor's business consists for the most part in the ownership and operation of a fleet of freight and/or passenger vessels in foreign and coastwise trade. Its four largest vessels are operated between New York and Buenos Aires and the debtor has a contract, expiring August 1, 1938, with the United States Government to carry United States mails

on such route. Unless the properties of the debtor are continued in operation and maintained in good order, such properties will greatly depreciate in value and must necessarily be sold at much less than the actual market value thereof and the debtor and its creditors will suffer heavy losses as a result thereof. Should any of the creditors of [fol. 18] the debtor succeed in enforcing their claims and thereby compel the debtor to suspend its business and become inactive, irreparable injury, damage and loss will be sustained by all creditors of the debtor.

That on information and belief, while the property, assets and business of the debtor are of great value as a going concern, and at a fair valuation exceed the amount of the debtor's indebtedness as aforesaid, if said business should cease and said property and assets should be sold or disposed of at forced sale they would not bring their true value and might prove to be insufficient to provide in full for the payment of the indebtedness of the debtor. If said properties and assets be dismembered by separate sales under execution, or if they cease to be operated or fall into disuse and become out of repair, or if the skilled executive, technical, manufacturing and selling organizations of the debtor be disrupted and scattered, or if its mail contract be lost, or if its valuable good will be not preserved by continuing its business, the creditors of the debtor and its stockholders will thereby suffer irreparable injury, damage and loss.

The only way the relative priorities and positions of the creditors and stockholders of the debtor can be preserved is through the continuance of the business of the debtor under a plan of reorganization, equitable and fair to all interests, to be made effective with the aid and under the supervision of this Court. That by reason of the foregoing it is essential for the protection of the rights and interest of the creditors and stockholders of the debtor that the debtor be afforded relief under Section 77B of the Bankruptcy Act.

[fol. 19] Sixth. That the debtor is unable to meet its debts as they mature and that it desires to effect a plan of reorganization pursuant to Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

Seventh. That the filing of this petition was duly authorized by the debtor by resolution of the Board of Di-

rectors of the debtor adopted at a meeting thereof duly held on the 21st day of May, 1934, as shown by the certificate of the President of the debtor attached hereto and made a part hereof as Exhibit "B".

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed, under said Section 77B, and that it be granted all other and further relief to which it may be entitled.

Munson Steamship Line, by Frank C. Munson, President. Davis, Polk, Wardwell, Gardiner & Reed, Attorneys for Debtor, 15 Broad Street, New York, N. Y.

(Verification and Exhibits A and B, attached to petition, are omitted from this record as surplusage.)

[fol. 20] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

ORDER APPROVING FILING OF PETITION AND RESTRAINING ORDER

This cause coming on to be heard at this time on the petition herein and the court having heard the arguments of counsel and the views of creditors and being fully advised in the premises, and being satisfied that such petition complies with Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy and has been filed in good faith, it is

Ordered, adjudged and decreed:

1. That said petition be and it hereby is approved as properly filed under Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

[fol. 21] 2. That the debtor is unable to meet its debts as they mature.

3. That by reason of the facts set forth in said petition, the debtor requires relief under said Section 77B and has

no adequate remedy save through the granting of such relief, and that it is necessary that trustees of the debtor's assets, properties and business be appointed.

4. That Edward P. Farley, Esq., and Morton L. Fearey, Esq., be and they are hereby appointed temporarily trustees of all and singular the assets, properties, lands, estates, rights and franchises, of whatever kind, character and description whatsoever and wheresoever situated, of the debtor. The said trustees shall have the same powers as those exercised by a receiver in equity to the extent consistent with the provisions of Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy.

5. That the trustees appointed herein be and hereby are authorized and directed, pending further order of this Court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the assets, properties and business of the debtor, wherever situated, whether in this State, judicial circuit, and whether in the United States of America or elsewhere, and to manage, operate and conduct its business, and to this end to exercise its authority and franchises and discharge all duties obligatory upon it, and to employ and dicharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and receive the [fol. 22] income, rents, revenues, tolls, issues and profits of said assets, properties and business; to collect all outstanding accounts and all dividends and interests on securities belonging to it, to aid and assist its subsidiary corporation as may be necessary to protect the debtor's interest therein, to continue, until further order of this Court, the existing purchasing, selling, operating, business and financial agreements, arrangements and relations of the debtor with its subsidiary companies and with the United States of America to the extent that they may be necessary or advisable in order that the properties of the debtor and its subsidiary companies may be operated as nearly as may be with the same policy of management, all in the same manner that it would be entitled and bound to do in its own right, and, to the extent necessary, to protect and preserve the assets, properties and business of the debtor, all according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

6. That within three (3) days from and after the entry of this order, said trustees shall each execute and file with the Clerk of this Court a joint bond with one or more solvent sureties approved by the Clerk of this Court, for the benefit of whom it may concern, in the sum of $50,000, conditioned to the effect that they will well and truly perform the duties of their office, and duly and faithfully account for all moneys and properties whatsoever which may come into their hands and abide by and perform all things which they shall be directed by the Court to do.

[fol. 23] 7. That all persons, firms and corporations having in their possession any of the property of the debtor are hereby ordered to deliver the same to the trustees appointed herein and to make such transfers, assignments and conveyances in connection therewith as may be necessary and proper; and each and every of the officers, directors, agents and employees of the debtor is hereby required to turn over and deliver to said trustees, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, contracts, notes, securities, accounts, moneys or other property in his or their hands, or under his or their control belonging to or in the possession of the debtor, and to abide by and conform to such orders not inconsistent with the provisions of Section 77B of Chapter VIII of the Act of Congress relating to bankruptcy as may be given from time to time by said trustees or their duly constituted representatives, in conducting the operation of the assets, properties and business of the debtor and in the discharge of their duties as trustees.

8. That the trustees so appointed shall, within ten days of the entry of this order, cause a notice to be mailed to each known creditor of the debtor at his last known post office address; to Guaranty Trust Company of New York, 140 Broadway, New York City, trustee of the debtor's mortgage and deed of trust dated as of January 1, 1929; to City Bank Farmers Trust Company, 22 William Street, New York City, trustee of the debtor's indenture dated as of January 1, 1929, and to the stockholders of the debtor as the same may appear on the books of the debtor, and to [fol. 24] cause publication of such notice to be made at least once a week for two successive weeks in a newspaper published and having a general circulation in the City of New York, New York, that a hearing will be held herein be-

fore this Court in Room 3, twelfth floor of the Woolworth Building, 233 Broadway, New York City, on the 28th day of June, 1934, at 4:30 o'clock in the afternoon, daylight saving time, to determine whether such appointment of said trustees shall be made permanent or shall be terminated and the debtor restored to possession, or whether such trustees be removed and the debtor continue in possession, or whether a substitute trustee or trustees or an additional trustee or trustees shall be appointed by the Court.

9. That the trustees are authorized in their discretion from time to time until further order of this Court, out of funds now or hereafter coming into their hands to pay:

(a) All necessary current expenses of the debtor in operating the assets and properties and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents or employees retained by the debtor;

(b) Pending further orders of this Court in the premises, the trustees hereby are authorized to pay pay checks and like instruments issued to employees for services rendered to the debtor, whenever the same are presented for payment;

[fol. 25] (c) The costs of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of the records and the registration and transfer of its stocks and bonds and trustees, charges under indentures under which securities of the debtor have been issued;

(d) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case, which are reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the trustees, the debtor, parties to the cause, and such others as may have a substantial interest therein; such expense to be taxed as costs in this case.

Until the trustees appointed herein shall have qualified the officers of the debtor are hereby authorized to continue to sign checks drawn on any Bank-accounts of the debtor.

10. That the trustees shall be allowed until September 1, 1934 (unless the time be extended further by order of this Court), within which to report to the Court as to the advisability of rejecting any contract of the debtor, executory in whole or in part, and continued operation by the trustees under any of said contracts, within said period allowed for such report and until the entry of an order directing such rejection, shall not be deemed to conclude the Court or the trustees in respect to such election, or to constitute an election.

[fol. 26] 11. That pending further order of the Court in the premises the trustees are authorized and empowered to institute or prosecute in any court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in their judgment, for the recovery or proper protection of the properties or rights of the debtor, and to make settlement of any thereof and likewise to defend any actions, claims, proceedings, or suits now pending against the debtor, or which may hereafter be asserted, or to be brought in any court or before any officer, department, commission or tribunal, to which the trustees or debtor are or shall be a party, but no payment shall be made by the trustees in respect of any such claims, actions, proceedings or suits; and no action taken by the trustees in defense or settlement of such claims, actions, proceedings or suits shall have the effect of establishing any claim upon or right in the properties or funds in the possession of the trustees, that otherwise would not exist.

12. The trustees shall close the present books of account of the debtor as of midnight June 13, 1934. The trustees shall open new books of account as of 12:01 o'clock A. M. June 14, 1934, and cause to be kept therein due and proper accounts of their earnings, expenses, receipts and disbursements as such trustees, and shall preserve proper vouchers for all payments made on account thereof, and deposit the moneys coming into their hands in any of the banks in which funds of the debtor are presently deposited, and/or in such other banks as shall be selected and approved by this Court.

[fol. 27] 13. That, not later than September 1, 1934, the trustees shall file with the Clerk of this Court a statement

of the assets and liabilities of the debtor as of midnight March 31, 1934, and within ninety days after the close of each quarter year thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the preceding quarter year, together with a summary statement of the revenues and expenses of the debtor for the preceding quarter year.

14. That the debtor, its stockholders, directors, officers, agents, attorneys, servants and employees, and all other persons, firms and corporations, including the sheriffs and marshals and their officers, agents, attorneys, representatives, servants and employees whether creditors or claiming to be creditors or having or claiming to have any right, title or interest of, in or to any property or properties of the debtor, be and they hereby are enjoined and restrained from interfering with, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, moneys, properties and premises belonging to or in the possession of the debtor or of the trustees, or from taking possession of or in any way interfering with the same, or any part thereof, or from interfering in any manner to prevent the discharge by the trustees of their duties and obligations in the maintenance and operation of said assets, properties and business under the orders of this Court, or from instituting or prosecuting or continuing the prosecution of any [fol. 28] action at law or action or proceeding in equity or admiralty or bankruptcy against the debtor or the trustees in any court of law or equity or admiralty or bankruptcy or before any association, organization, commission, board, referee or other court or tribunal, or otherwise, and all persons, parties, firms and corporations, including the debtor, and their representatives, agents, attorneys and servants, and all sheriffs, marshals, and their officers and their deputies, representatives and servants, are hereby enjoined and restrained from selling, removing, transferring, disposing of or attempting in any way to sell, remove, transfer or dispose of or in any way to interfere with any properties, assets or effects in the possession of the debtor or of the trustees or owned by the detbor or the trustees and in the possession of any officers, agents, attorneys or

representatives of the debtor or of the trustees or of any other person, party, firm or corporation, and from doing any act whatsoever to interfere with the possession and management by the trustees of the assets, properties and business of the debtor, or in any way to interfere with the trustees in the discharge of their duties or to interfere in any way with the administration and disposition in this proceeding of the affairs and properties of the debtor and of the trustees. Provided, however, that the Court may, upon notice and for cause shown, permit any judicial proceeding to enforce any lien upon the estate of the debtor.

15. This Court reserves full right and jurisdiction to make from time to time such orders as the Court shall deem proper, fixing the time within which any plan of re- [fol. 29] organization shall be proposed, accepted and confirmed, requiring the debtor or the trustees to file such schedules and submit such information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan, determining a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and after which no such claim or interest may participate in any plan, except on order for cause shown, the manner in which such claims and interests may be filed or evidenced and allowed and, for the purposes of any proposed plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and in general such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Alfred C. Coxe, U. S. D. J.

Dated June 13, 1934.

I hereby certify that the bond required by the foregoing order has been approved and filed.

Charles Weiser, Clerk. (Seal of the United States District Court for the Southern District of New York.)

[fol. 30] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

NOTICE OF MOTION FOR MODIFICATION OF RESTRAINING ORDER

SIRS:

Please Take Notice that upon the annexed affidavit of Roy H. Caldwell, sworn to on the 25th day of January, 1935, and on all the proceedings heretofore had in the above entitled matter as well as on all the proceedings and pleadings heretofore had in the case of Baxter N. Foust, as administrator of Coy E. Foust, deceased, v. Munson Steamship Line, now pending in the United States District Court for the Southern District of New York, the undersigned will move this Court at a stated term thereof for the hearing of motions to be heard at the United States District Court, Southern District of New York, Old Post [fol. 31] Office Building, in the City of New York, on the 30th day of January, 1935, at 10:30 in the forenoon, or as soon thereafter as counsel can be heard, for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter, on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as administrator of Coy E. Foust, deceased, above named, to proceed to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line and for such other, further and different relief as may be just and proper.

Dated January 25th, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, 1 Broadway, New York City.

To Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.
White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City.

[fol. 32] In United States District Court, Southern District of New York

No. 59,923

[Title omitted]

Affidavit of Roy H. Caldwell

State of New York,
County of New York, ss:

Roy H. Caldwell, being duly sworn, deposes and says that he is a member of the firm of Gazan & Caldwell, attorneys for Baxter N. Foust, as administrator of Coy E. Foust, deceased, who has an action pending in the United States District Court, for the Southern District of New York, and that the name or style of the aforesaid action is Baxter N. Foust, as administrator of Coy E. Foust against the Munson Steamship Line, and that the aforesaid action was instituted on or about January 15, 1934, and that the defendant thereafter duly appeared and interposed an an-
[fol. 33] swer. That the aforesaid action was duly noticed for trial in the United States District Court for the Southern District of New York, and bears docket No. L. 56, page 336, and its calendar number is 909.

Deponent states that this action was instituted to recover damages growing out of the death of Coy E. Foust, deceased, as more fully set forth in the complaint herein and claim was likewise made for the conscious pain and suffering sustained by the unfortunate decedent.

Deponent further states that on or about the 13th day of June, 1934, the Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, in the Matter of Munson Steamship Line, in Proceedings for Reorganization of a Corporation, being No. 59,923, signed an order staying the prosecution and institution of all actions.

Deponent is informed and verily believes that the administrator and his family were dependent upon the aforesaid Coy E. Foust, decedent herein, for support and that he contributed during his lifetime to the support of his father and his father's family.

Deponent further states that the order signed by Hon. Alfred C. Coxe on or about the 13th day of June, 1934, has

or will prevent this plaintiff from prosecuting his action to a final award much to the great distress and hardship of this unfortunate plaintiff who sustained not only a financial loss but also the loss of his son.

Deponent further states, upon information and belief, that the Munson Steamship Line was covered by liability [fol. 34] insurance and that any judgment recovered against the aforesaid Munson Steamship Line will have to be paid by the insurance company which covered any loss for loss of life or personal injuries on board the steamship "Mundelta" at the time in question.

Deponent further states that if the Court permits this administrator to perfect his claim to a final award, he will then bring suit under Section 109 of the Insurance Law of the State of New York for satisfaction of the award, if any.

Deponent believes that the Court in permitting a stay of this action is doing an injustice to the unfortunate administrator and his family and is not in any way benefiting the Munson Steamship Line, or those having claims against the Munson Steamship Line, as the final payment of this award must necessarily be made by the insurance company. The only party benefiting by the delay is the insurance company covering the loss.

Deponent is informed and verily believes that the Munson Steamship Line paid for this protection and accordingly the unfortunate administrator who lost his son, should not be prevented from having his day in court.

Deponent states that under the Merchant Marine Act of 1920 and the Bankruptcy Law as amended in January, 1934, this plaintiff is entitled to a trial by jury and further, that his claim is a preferred claim and this preferred claimant should not be stayed or prevented from having his day in court by reason of any fancied wishes or desire for delay on the part of the Munson Steamship Line who reck- [fol. 35] lessly and negligently caused the plaintiff's son to meet his death under a considerable period of pain and suffering.

Wherefore, deponent respectfully requests that an order be entered modifying the order heretofore signed by Hon. Alfred C. Coxe, on or about June 13, 1934, and permitting Baxter N. Foust as administrator of Coy E. Foust, de-

ceased, to prosecute his claim to a final award before a jury.

Deponent states that no previous application has been made for the relief herein requested.

Roy H. Caldwell.

Sworn to before me this 25th day of January, 1935. Eileen Koslow, Notary Public, Bronx County. Bronx Co. Clk's No. 213, Reg. No. 202K36. N. Y. Co. Clk's No. 974, Reg. No. 6K567. Commission expires March 30, 1936.

[fol. 36] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

AFFIDAVIT OF ALFRED N. HEUSTON, IN OPPOSITION TO MOTION TO MODIFY RESTRAINING ORDER

STATE OF NEW YORK,
County of New York, ss:

Alfred N. Heuston, being first duly sworn, deposes and says:

1. That he is associated with the firm of White & Case, attorneys for Edward P. Farley and Morton L. Fearey, [fol. 37] trustees of Munson Steamship Line, debtor, in the above entitled proceeding.

2. That this Court has heretofore denied three similar petitions made by Messrs. Caldwell & Gazan in other causes where they represent the plaintiffs; namely, Orlan Moore, John Larkin and Joseph A. Soucy, all against the debtor, for leave to proceed with their claims for damages for personal injuries to verdict and judgment against the debtor. The question of law raised by the said petitions, including the jurisdiction and authority of this Court to deal therewith, were fully briefed for the Court by the respective parties and after due and careful consideration this Court denied all of said petitions, and on January 7, 1935, signed an order in each of said three causes in the same form; a

copy of one of said orders is annexed hereto and made a part hereof.

Wherefore, affiant respectfully prays, on behalf of said trustees of the debtor, Munson Steamship Line, that the petition on behalf of Baxter N. Foust, as administrator of Coy E. Foust, deceased, be denied and that an order be entered herein in the same general form as the order entered in the case of Orlan Moore and the other petitioners referred to above.

Alfred N. Heuston.

Sworn to before me this 29th day of January, 1935.
James McGarron, Notary Public.

[fol. 38] IN UNITED STATES DISTRICT COURT

No. 59923

[Title omitted]

ORDER IN ORLAN MOORE MATTER DENYING MOTION TO MODIFY RESTRAINING ORDER—January 7, 1935

A motion having been regularly made by Orlan Moore in the case of Orlan Moore v. Munaires Steamship Corporation and Munson Steamship Line, now pending in the United States District Court for the Eastern District of New York for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Orlan Moore above [fol. 39] named, to proceed to trial in the above entitled action and to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and said motion have regularly come on to be heard at a stated term of this court for the hearing of motions, and due deliberation having been had and said motion having been denied by this court.

Now, on reading and filing the notice of motion dated October 30, 1934, with admission of service thereof upon

the attorneys for Munson Steamship Line and for Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and the affidavit of Roy H. Caldwell, sworn to the 30th day of October, 1934, in support of said motion and the affidavit of Irving L. Evans, sworn to the 5th day of November, 1934, in opposition thereto, and after hearing Roy H. Caldwell, Esq., of counsel, in support of said motion, and Irving L. Evans, of counsel, in opposition thereto, and due deliberation having been had and the court having filed the opinion in writing on December 10, 1934,

Now, on motion of Gazan & Caldwell, attorneys for Orlan Moore, it is

Ordered that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

Ordered that a Special Master will be appointed to hear and report on the claim of the aforesaid Orlan Moore, if the [fol. 40] claimant so desires.

(Sgd.) Alfred C. Coxe, U. S. D. J.

IN UNITED STATES DISTRICT COURT

No. 59923

[Title omitted]

ORDER DENYING MOTION TO MODIFY RESTRAINING ORDER—March 20, 1935

A motion having been regularly made by Baxter N. Foust in the case of Baxter N. Foust, as Administrator of [fol. 41] Coy E. Foust, deceased, v. Munson Steamship Line, now pending in the United States District Court for the Southern District of New York, for an order modifying the order signed by Hon. Alfred C. Coxe, United States District Judge, in the above captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as Administrator of Coy E. Foust, deceased, above named, to proceed to trial in the above entitled action and to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L.

Fearey, Esq., trustees for Munson Steamship Line, and said motion having regularly come on to be heard at a stated term of this court for the hearing of motions, and due deliberation having been had and said motion having been denied by this court.

Now, on reading and filing the notice of motion, dated January 25, 1935, with admission of service thereof upon the attorneys for the Munson Steamship Line and upon the attorneys for Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line, and the affidavit of Roy H. Caldwell, sworn to the 25th day of January, 1935, in support of said motion and the affidavit of Alfred N. Heuston, sworn to on the 29th day of January, 1935, in opposition thereto, and after hearing Simone N. Gazan, Esq., of counsel, in support of said motion, and Irving L. Evans, of counsel, in opposition thereto, and due deliberation having been had and the court hav-

[fol. 42] ing filed its opinion in writing,

Now, on motion of Gazan & Caldwell, attorneys for Baxter N. Foust as Administrator of Coy E. Foust, deceased, it is

Ordered, that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

Ordered, that a Special Master will be appointed to hear and report on the claim of the aforesaid Baxter N. Foust as Administrator of Coy H. Foust, deceased, if the claimant so desires.

Alfred C. Coxe, U. S. D. J.

[fol. 43] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

NOTICE OF APPEAL

SIRS:

Please Take Notice that Baxter N. Foust, as Administrator of Coy E. Foust, deceased, in an action against the Munson Steamship Line, the claimant herein, hereby ap-

peals to the United States Circuit Court of Appeals for the Second Circuit from the order signed by the Hon. Alfred C. Coxe, United States District Judge, Southern District of New York, dated the 20th day of March, 1935, and entered in the office of the Clerk of this Court, and from each and every part of said order.

Dated, New York, N. Y., April 2, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

[fol. 44] To White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 59,923

[Title omitted]

MOTION FOR LEAVE TO APPEAL AND ORDER ALLOWING APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Baxter N. Foust, as Administrator of Coy [fol. 45] E. Foust, deceased, in an action against the Munson Steamship Line, respectfully shows:

I. That on or about the 20th day of March, 1935, an order was made herein by Hon. Alfred C. Coxe, denying a motion made by petitioner herein for an order modifying the order signed by the Hon. Alfred C. Coxe, United States District Judge, in the aforesaid captioned matter on the 13th day of June, 1934.

II. I am advised that the said order denying the motion made by petitioner herein for an order modifying the order made by the Hon. Alfred C. Coxe, United States District Judge, on the 13th day of June, 1934, is erroneous as a matter of law.

III. Filed herewith are the assignments of error in which I have set forth what I believe to be the errors committed by the court in making said order, dated the 20th day of March, 1935.

Wherefore, I respectfully pray for leave to appeal to the United States Circuit Court of Appeals for the Second Circuit and that this petition for appeal be allowed as required by law and for such other and further relief as in the premises may seem proper.

Dated, April 3rd, 1935.

Gazan & Caldwell, Attorneys for Petitioner, by Roy H. Caldwell.

Petition for leave to appeal allowed this 4th day of April, 1935.

Henry W. Goddard, U. S. D. J.

[fol. 46] *Duly sworn to by Roy H. Caldwell. Jurat omitted in printing.*

[fol. 47] In United States District Court, Southern District of New York

No. 59,923

[Title omitted]

Assignments of Error

The petitioner, Baxter N. Foust, as administrator of Coy E. Foust in an action against Munson Steamship Line, for his assignment of errors upon the decision of the Court, dated the 20th day of March, 1935, denying the motion of petitioner for an order modifying the order of Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York, signed the 13th day of June, 1935, alleges that the Court committed the following errors:

1. The Court erred in refusing to modify the order signed by the Hon. Alfred C. Coxe, on the 13th day of June, 1934, in order to grant the petitioner the right of trial by jury.

[fol. 48] 2. The Court erred in refusing the petitioner as administrator of a deceased seaman under Section 33 of the Merchant Marine Act of 1920, the right of trial by jury.

3. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of trial by jury under common-law.

4. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of trial by jury under Section 77B of the Bankruptcy Act.

5. The Court erred in refusing to grant petitioner as administrator of a deceased seaman the right of a common law trial by jury under Section 205, U. S. C. A., Title 11, as Amended to March 3, 1934, sub-paragraph S.

6. The Court erred in depriving petitioner as administrator of a deceased seaman of his constitutional right of trial by jury.

Dated, New York, April 3, 1935.

Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

[fol. 49] Citation, in usual form, omitted in printing.

[fol. 50] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL

SIRS:

Please Take Notice that on the annexed verified petition of Baxter N. Foust, as administrator of Coy E. Foust, deceased, the claimant herein, and upon the petition for appeal and assignment of errors, dated the 1st day of April, 1935, and filed in the office of the clerk of the United States District Court for the Southern District of New York, and on the order of the Hon. Alfred C. Coxe, District Judge for the Southern District of New York, dated the 20th day of March, 1935, which order denied the motion of claimant to

modify the order of the Hon. Alfred C. Coxe, United States [fol. 51] District Judge, signed on the 13th day of June, 1934, an application will be made at a motion term of this court to be held in room 434 in the Post Office Building in the Borough of Manhattan, City of New York, on the 8th day of April, 1935, at 10:30 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard for an order granting leave to appeal pursuant to Section 24 B of the Bankruptcy Act from the order made by the Hon. Alfred C. Coxe, dated the 20th day of March, 1935, and for such other and further relief as may be proper.

Dated, April 1st, 1935.

Yours, etc., Gazan & Caldwell, Attorneys for Claimant, Office & P. O. Address, 1 Broadway, New York City.

To White & Case, Esqs., Attorneys for Trustees, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Esqs., Attorneys for Munson Steamship Line, 116 John Street, New York City.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

PETITION FOR LEAVE TO APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Baxter N. Foust, as administrator of Coy E. Foust, deceased, who has an action pending in the United States District Court for the Southern District of New York in the name and style of Baxter N. Foust, as administrator of Coy E. Foust, deceased, v. Munson Steamship Line, respectfully shows:

1. That the aforesaid action was instituted in the aforesaid court on or about January 15, 1934, and that the defendant thereafter duly appeared and interposed an an-[fol. 53] swer. That the aforesaid action was duly noticed for trial in the United States District Court for the South-

ern District of New York, and bears docket No. L. 56, page 336, and its calendar number is 909.

That this petitioner respectfully states that this action was instituted to recover damages growing out of the death of Coy E. Foust, deceased. That the aforesaid Coy E. Foust met his death on or about February 20, 1932, while employed as a member of the crew of the steamship "Mundelta," at Searsport, Maine, by reason of the negligence of the owner and operator of the steamship "Mundelta" in failing among other things to provide the decedent a safe place in which to work; in failing to have sufficient light in 'tween decks; in failing to have guard rails around an open hatch; in permitting the top deck hatch to be and remain covered, thereby excluding daylight from entering the 'tween decks; in failing to furnish adequate artificial light in 'tween decks about #1 and #2 hatches while decedent was engaged in work; in failing to warn decedent of dangers to be encountered in connection with the work.

That the aforesaid action was brought to recover damages under Section 33 of the Merchant Marine Act of Congress commonly known as the Jones Act.

2. That on or about the 25th day of January, 1935, the claimant herein moved for an order modifying the order signed by the Hon. Alfred C. Coxe, United States District [fol. 54] Judge, in the aforesaid captioned matter on the 13th day of June, 1934, in that the aforesaid order be modified to permit Baxter N. Foust, as administrator to proceed to prosecute his claim against the Munson Steamship Line to a final award and/or final awards against Edward P. Farley, Esq., and Morton L. Fearey, Esq., trustees for Munson Steamship Line and for such other, further and different relief as may be just and proper.

3. That the Hon. Alfred C. Coxe, United States District Judge for the Southern District of New York on the 20th day of March, 1935, arrived at a decision and denied claimant's motion for an order modifying the order heretofore entered in the above captioned matter on or about the 13th day of June, 1934. That the aforesaid order was entered on the 20th day of March, 1935, a copy of which order is attached hereto and made a part thereof.

4. It is respectfully shown that the learned Court below is in error in denying the motion made by your petitioner

to modify the order of the Hon. Alfred C. Coxe, dated the 13th day of June, 1934. That it was a matter entirely within the discretion of the aforesaid Court as to whether or not Baxter N. Foust, as administrator, should be permitted to proceed to trial before a jury and that the Court's discretion should have been exercised in favor of claimant so that claimant would not be deprived of substantial rights. [fol. 55] That the petitioner is entitled under the U. S. C. A., Title 46, Section 688, commonly known as Section 33 of the Merchant Marine Act of 1920, to a trial by jury; regardless of the fact that the Munson Steamship Line has instituted proceedings for reorganization of the corporation under Section 77B of the Bankruptcy Act as amended, because the aforesaid action was brought under U. S. C. A., Title 46, Section 688, which reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, *with the right of trial by jury, and in such action . . . statutes of the United States modifying or extending the common-law right of remedy in cases of personal injury to railway employees shall apply;* and in case of death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law *with the right of trial by jury,* and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Italics ours.)

That the petitioner has a right to a common law action with trial by jury and to have damages fixed by jury and not by any referee or commissioner in bankruptcy appointed by this Court.

[fol. 56] The precedent established in The Kerney, 3 Fed. Supp. 718, should be followed in this case, for the right of trial by jury should not lightly be taken away from this petitioner. A steamship company should not be allowed to benefit by its own wrong.

In Panama R. Co. v. Vasquez, 36 S. Ct. 557, it was held in an action by the personal representative of a deceased

seaman under Section 33 of the Merchant Marine Act of 1920 against a ship owner to recover for the seaman's death owing to the alleged negligence of the owner, that Congress reserved to suitors of cases the right to common-law remedy where the common-law is competent to give it.

Petitioner's claim was brought under Section 33 of the Merchant Marine Act and is a preferred claim against the Munson Steamship Line in either receivership or reorganization in view of the facts of the United States statutes above cited and again in view of Section 205, U. S. C. A., Title 11, as amended to March 3, 1934, Paragraph S, which reads as follows:

"In proceedings under this section, claims for personal injuries to employees of a railroad corporation and claims of personal representatives of deceased employees of a railroad corporation arising under State or Federal Laws, shall be preferred claims against the assets of such railroad corporation in receivership or in reorganization as herein provided, such claims to be subordinate only to costs of administration of such receivership or reorganization."

[fol. 57] That it was the intention of Congress not to take away any of the rights of the employees of railroad corporations or merchant seamen whose rights have been expressly defined by Congress and by the United States Supreme Court time after time as expressly as those of an employee of a railroad corporation and is borne out — Paragraph O of Section 77B of the Bankruptcy Act which reads as follows:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of this court, the duties of the debtor *and the rights and liabilities of creditors,* and of all persons with respect to the debtor and its property, *shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved.*" (Italics ours.)

It is needless to say that Congress expressly provided that claims of seamen for damages for personal injuries is a preferred claim against the owners of steamship companies in receivership or in reorganization and it naturally

follows that a seaman is entitled to a common-law trial by a jury.

The mere fact that Congress was silent with reference to seamen in Section 77B, does not mean that the rights of a seaman to a common-law trial are in any way limited or denied.

It has been uniformly held that a statute is not repealed by implication.

[fol. 58] Petitioner respectfully alleges on information and belief that the Munson Steamship Line was covered by liability insurance and that any judgment recovered against the Munson Steamship Line will have to be paid by the insurance company which covered any loss for loss of life or personal injury on the Steamship "Mundelta" at the time in question and that if the Court permits this petitioner to prosecute his claim to a final judgment by jury, that it would not in any way injure the Munson Steamship Line nor those who have claims against the Munson Steamship Line as petitioner is informed and believes and that the final payment of the judgment, if any, must necessarily be made by the insurance carrier who is the only party benefiting by the proceeding under Section 77B of the Bankruptcy Act. Under the Insurance Law of New York, Section 109, every policy written in New York must contain a statement that the injured seaman may proceed to collect from the insurance company in the event of bankruptcy or insolvency of the steamship owner. Therefore, if a trial by jury is denied to seamen who may have claims against the steamship line, the benefit of such action will inure not to the bankrupt estate but to the insurance carrier.

Petitioner agrees that in the event this Court grants the right to reduce the claim of this petitioner to judgment before a jury, petitioner will move expeditiously to have this case placed upon the calendar for early trial and to apply to Judge Knox in the Southern District to grant a preference and petitioner is confident that after Judge Knox [fol. 59] understands that the object of obtaining a preference is to enable the Bankruptcy Court to act promptly in the reorganization proceedings he will cooperate to that end.

In this claim, the Munson Steamship Line is represented by Tompkins, Boal & Tompkins of No. 116 John Street,

New York City, who represents the insurance carrier and consequently the defense of this case will impose no burden whatsoever, either financial or otherwise, upon the trustees herein or their counsel. The trustees are not necessary parties to the action and the suit may proceed to trial without interfering with the orderly administration of this debtor's affairs.

5. By denying this motion to modify the order signed by the Hon. Alfred C. Coxe, dated June 13, 1934, the Court has deprived this petitioner of the only effective method of obtaining relief under Section 33 of the Merchant Marine Act of 1920 and has deprived your petitioner of the right of trial by jury.

Wherefore your petitioner prays that an order be made granting leave to appeal from the decision made by Hon. Alfred C. Coxe, United States District Judge, Southern District of New York, dated the 20th day of March, 1935, and for such other and further relief as may be proper.

Gazan & Caldwell, as Attorneys for Baxter N. Foust, Petitioner, by Roy H. Caldwell.

(Verification omitted and copy order of Judge Coxe attached to motion also omitted as elsewhere contained in this record.)

[fol. 60] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 59,923

[Title omitted]

AFFIDAVIT OF IRVING L. EVANS, IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK,
County of New York, ss:

Irving L. Evans, being duly sworn, deposes and says:

That he is of counsel for Edward P. Farley and Morton L. Fearey, Esqs., trustees for the Munson Steamship Line

in Reorganization; that he is familiar with the matters concerning this petition.

That the Munson Steamship Line filed a petition for reorganization under Section 77B of the Bankruptcy Act, and pursuant to said petition and said section of the Bankruptcy Act an order was entered in the United States District Court for the Southern District of New York on the 13th day of June, 1934, enjoining all pending litigation against the Munson Steamship Line. No appeal has ever [fol. 61] been taken from that order. Further orders have been entered directing the filing of claims with the trustees. The time for filing such claims has been extended to April 30, 1935.

The petitioner, Baxter N. Foust, as administrator of Coy E. Foust, deceased, made a motion to vacate the order of June 13th or to modify it so as to permit him to proceed to trial in the action which he had instituted against the Munson Steamship Line to the point of final award or awards against Edward P. Farley, Esq., and Morton L. Feary, Esq., as trustees of the Munson Steamship Line. Judge Coxe signed an order under date of March 20th, 1935, denying this motion, a copy of which order is attached to the petition and made a part thereof. It recites

"Now on motion of Gazan & Caldwell, attorneys for Baxter N. Foust as Administrator of Coy E. Foust, deceased, it is

"Ordered that the motion to vacate the stay or to modify the same, be and it hereby is denied, and it is further

"Ordered that a Special Master will be appointed to hear and report on the claim of the aforesaid Baxter N. Foust as Administrator of Coy E. Foust, deceased, if the claimant so desires."

This is an attempt to appeal from the decree of June 13, 1934 at this date by the device of a motion to vacate or modify it and by taking an appeal from the denial of such motion.

The petitioner concedes that this matter is entirely within the discretion of the District Court. The fourth assign- [fol. 62] ment of error, on page 2 of the petition, states:

"It is respectfully shown that the learned court below is in error in denying the motion made by your petitioner to modify the order of the Hon. Alfred C. Coxe, dated the 13th

day of June, 1934. That it was a matter entirely within the discretion of the aforesaid court as to whether or not Baxter N. Foust as administrator, should be permitted to proceed to trial before a jury and that the court's discretion should have been exercised in favor of claimant so that claimant would not be deprived of substantial rights."

There is no allegation of any abuse of discretion and no facts set forth to show any abuse of discretion in the petition.

An order entered by the District Court on a matter within its discretion is not properly appealable to this Court under Section 24B of the Bankruptcy Act under which this motion is made.

It is respectfully submitted that the motion for leave to appeal should be denied.

Irving L. Evans.

Subscribed and sworn to before me this 15th day of April, 1935. Elizabeth M. Childs, Notary Public. Kings Co. Clk's No. 118, Reg. No. 6107. N. Y. Co. Clk's No. 212, Reg. No. 6C102. Term expires March 30, 1936.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In re MUNSON STEAMSHIP LINE

Before L. Hand, Swan and Chase, Circuit Judges

On motion for leave to appeal.

Gazan & Caldwell, for the motion.
Irving L. Evans, opposed.

OPINION GRANTING LEAVE TO APPEAL

Per CURIAM:

Leave to appeal will be granted not because the appellant may have a right to trial by a jury of his claim against the company upon its reorganization, but because we are in doubt whether the cause will be discharged by the final order in the reorganization proceedings; Sec. 77-B (h), (k) and

(o). If it will not be, it may be that the court should not stay the action at all; Sec. 11 (a).

The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all.

[fol. 64] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL—May 6, 1935

A motion having been made hereby by counsel for the appellant for leave to appeal from a certain order of the District Court, dated March 20, 1935,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 65] IN UNITED STATES CIRCUIT COURT OF APEALS, SECOND CIRCUIT

No. 59,923

[Title omitted]

MOTION FOR LEAVE TO FILE SUPPPLEMENTAL ASSIGNMENTS OF ERROR

SIRS:

Please Take Notice that Baxter N. Foust, as Administrator of the Estate of Coy E. Foust, deceased, claimant, against the trustees of the Munson Steamship Line, debtor, in Reorganization Proceedings in the United States District Court for the Southern District of New York, upon the affidavit of Simone N. Gazan, duly verified the 7th day of May, 1935, and upon the application for leave to appeal and the order of this Court thereon, allowing the appeal, and upon all proceedings had in the United States District Court for the Southern District of New York, an applica-

tion will be made at a motion term of this court to be held in Room 435 in the Old Post Office Building in the Borough [fol. 66] of Manhattan, City of New York on the 13th day of May, 1935 at 10:30 A. M. on said date, or as soon thereafter as counsel may be heard, for leave to file supplemental assignments of error, pursuant to an order of this court, dated April 29, 1935, in respect of an application of this movant for leave to appeal, and for an order authorizing, directing and allowing the said movant to file nunc pro tunc supplemental assignments of error, a copy of said assignments of error being hereto attached, and for such other, further and different relief as may be proper.

Yours, etc., Gazan & Caldwell, Office & P. O. Address, 1 Broadway, New York City.

To White & Case, Attorneys for Trustees of the Munson Steamship Line, 14 Wall Street, New York City. Tompkins, Boal & Tompkins, Attorneys for Munson Steamship Line, 116 John Street, New York City.

[fol. 67] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF SIMONE N. GAZAN, IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

Simone N. Gazan, on oath, deposes and says, that he is a member of the law firm of Gazan & Caldwell, which firm are attorneys for Baxter N. Foust, as Administrator of Coy E. Foust, deceased, and that deponent is entirely familiar with the claim of said client.

Deponent says that administrator brought a common law action against Munson Steamship Line in the United States District Court for the Southern District of New York. That the summons and complaint were served on January 15th, 1934, and answer was served on February 5th, 1934.

That on or about June 13th, 1934, the Munson Steamship Line filed a petition as an insolvent debtor and sought reorganization in bankruptcy. That an order was made and

entered whereby certain trustees were appointed, and a general stay against the prosecution of all suits and claims was also ordered.

[fol. 68] At the time of the filing of the petition for reorganization this Foust case had not been reached for trial, and, of course, no judgment had been entered.

The death of Coy E. Foust occurred on a vessel of the Munson Steamship Line under circumstances of such negligence as would make the employer liable in damages for the pecuniary loss sustained by the beneficiaries of said decedent; that the said administrator had and has a good cause of action for damages.

At the time of this accident the Munson Steamship Line carried liability insurance to protect itself against loss or damages by reason of such negligent injury or death, which said policy was in force at the time, and that under Section 109 of the Insurance Law of the State of New York the said administrator, once obtaining a judgment for damages against the insured Munson Steamship Line, could, in view of the insolvency of the said insured, recover against the insurance company the amount of said judgment less any deductible in favor of the insured.

Deponent says that under said Insurance Law the administrator had and has a substantial right against said insurance company; that a recovery from such insurer will in no way affect the assets of the said debtor; that the defense of the action would be upon the insurance company and its attorneys and not upon the trustees of Munson Steamship Line; that the orderly administration of the proceedings in bankruptcy would not be affected.

In view of the foregoing the said administrator, as plaintiff in the common law action, applied for a modification of the stay so that the claim could be reduced to judgment [fol. 69] and its amount thereby fixed, so that proceedings could thereupon be instituted against the insurance company, and that said claimant be not required to make proof before a referee and have the claimant considered as a creditor in the reorganization proceedings.

This application was denied. Exceptions were duly taken and notice of appeal served, filed and allowed.

A motion was made in this court for leave to appeal but this was denied as to any question involving the right to a jury trial, but leave was granted to present the ques-

tions as to whether such claim would be discharged by the final order in the reorganization proceedings and, whether the court should stay said common law action at all.

The said plaintiff desires to avail himself of this privilege of appeal but being in doubt if the questions specified are adequately covered by the original assignments of error of file, moves the court for permission to serve and file supplemental assignments of error, a copy of the proposed assignments being hereto attached.

Simone N. Gazan.

Sworn to before me this 7th day of May, 1935. Eileen Koslow, Notary Public, Bronx County. Bronx Co. Clk.'s No. 213, Reg. No. 202K36. N. Y. Co. Clk.'s No. 974, Reg. No. 6K567. Commission expires March 30, 1936.

(Proposed supplemental assignments of error, attached to motion, omitted because contained elsewhere in this record.)

[fol. 70] In United States Circuit Court of Appeals for the Second Circuit

No. 59,923

[Title omitted]

Affidavit of Alfred N. Heuston, in Opposition to Motion for Leave to File Supplemental Assignments of Error

State of New York,
County of New York, ss:

Alfred N. Heuston, being duly sworn, deposes and says:

He is associated with the firm of White & Case, attorneys for Edward P. Farley and Morton L. Fearey, trustees for the Munson Steamship Line in Reorganization, and that he is familiar with the matters concerning this appeal and this motion.

This Court in granting the motion for leave to appeal filed a per curiam opinion stating that it allowed the appeal "because we are in doubt whether the cause will be discharged by the final order in the reorganization proceed-

ings; Sec. 77-B (h), (k) and (o). If it will not be, it may be that the court should not stay the action at all; Sec. 11 (a).

[fol. 71] "The briefs and argument will not, therefore, touch the right of trial by jury of the claim in reorganization as to which leave is denied; it will be confined to whether the action can be stayed at all."

This Court has stated the issue on which the case is to be argued on appeal and no further assignments of error are necessary and they will only tend to further encumber the record and confuse the issue. Nothing further is added by the suggested supplemental assignments of error numbers 7 and 8. Supplemental assignment of error number 9 covers matters which are not in the record, questions which were not before the District Court and many statements of fact which are erroneous, which we should not be called upon to disprove in this Court. Even if leave to file the supplemental assignments of error is permitted, it should be confined to numbers 7 and 8 and should not be allowed as to number 9 because that brings into the case in this Court new facts and new questions which were not before the District Court and not considered by it.

It is respectfully submitted that motion for leave to file supplemental assignments of error should be denied, but if allowed, should be restricted to numbers 7 and 8.

Alfred N. Heuston.

Sworn to before me this 10th day of May, 1935. Addison Y. Yeaman, Notary Public, Westchester County. N. Y. Co. Clk.'s No. 45, Reg. No. 7Y27. Certificate filed in Westchester Co. Commission expires March 30, 1937. (Seal.)

[fol. 72] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER ALLOWING SUPPLEMENTAL ASSIGNMENTS OF ERROR—May 20, 1935

A motion having been made herein by counsel for claimant for leave to file supplemental assignments of error.

Upon consideration thereof, it is

Ordered that the said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 73] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

No. 59,923

[Title omitted]

SUPPLEMENTAL ASSIGNMENTS OF ERROR

7. Because the court erred in staying the prosecution of the common law action for tort commenced by Baxter N. Foust as administrator aforesaid to recover pecuniary loss sustained by the beneficiaries of the said decedent by reason of his death by wrongful act, and in refusing to vacate or modify said stay so as to permit the prosecution of said action to judgment, because said action for tort not reduced to judgment at the time of proceedings were filed, is one not cognizable in bankruptcy, nor within the intendment and scope of Section 77b of the Bankruptcy Law.

8. Because the court erred in granting a stay and thereby restraining the prosecution to judgment of the said cause [fol. 74] of action for death by wrongful act, and in refusing to vacate or modify said stay so as to permit said common law action to be prosecuted to judgment, for that said cause of action, and any judgment recovered after filing of the debtor's petition would not constitute such an existing or fixed liability within the purview of the Bankruptcy Law, and particularly Section 77b thereof, because such judgment for tort would not be discharged by a decree of discharge in said reorganization or bankruptcy proceedings.

9. The court further erred in granting a stay as to this particular cause of action, and in refusing to vacate or modify its order of stay so as to permit the said common law action to proceed to judgment against the Munson Steamship Line, because the cause of action arose, and the suit thereon commenced, before the filing of the Reorganization Proceedings in Bankruptcy, and because the Munson Steamship Line carried liability insurance for the purpose of indemnifying itself against loss by reason of a cause of action of this nature, and that under the provisions of Section 109 of the Insurance Law of the State of New York, the judgment-tort-creditor has a right of action, upon the insolvency or bankruptcy of the judgment-tort-debtor, directly against said insurance company and that it was a denial of due process of law and of the equal protection of the laws, and it was a deprivation of a substantial legal right to prevent and deny said plaintiff the right to obtain judgment against the Munson Steamship Line so that thereby, upon the insolvency or bankruptcy of the Munson Steamship Line, said plaintiff could avail himself [fol. 75] of the said provisions of the Insurance Law, all of which could have been done without detriment or loss to the Munson Steamship Line or any of its assets, and without impediment to or interference with the reorganization proceedings, and was in no wise an effort to enforce any lien upon the estate.

Gazan & Caldwell, Attorneys for Baxter N. Foust, as Administrator of the Estate of Coy E. Foust, Office and P. O. Address, 1 Broadway, New York City.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, by and between the attorneys representing the respective parties to the above [fols. 76 and 77] entitled case that the foregoing is a true transcript of the record of the said District Court in the above entitled case, as agreed on by the parties.

It is further stipulated and agreed that either party may have printed in a supplemental transcript of record and refer to on the argument, any papers filed in the above proceedings.

Dated, New York, June —, 1935.

Gazan & Caldwell, Attorneys for Appellant. White & Case, Attorneys for Trustees of Munson Steamship Line, Debtor.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued Oct. 23, 1935. Decided Jan. 6, 1936

No. 77

In the Matter of MUNSON STEAMSHIP LINE, Debtor

Ex parte BAXTER N. FOUST, as Administrator of Coy E. Foust, Deceased, Appellant,

v.

MUNSON STEAMSHIP LINE and EDWARD P. FARLEY and MORTON L. FEAREY, Trustees, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal from United States District Court for the Southern District of New York.

From an order denying a motion by Baxter N. Foust, as administrator of Coy E. Foust, deceased, to vacate or modify a restraining order enjoining the prosecution of an action at law to recover damages against the debtor arising because of the death of the son of Baxter N. Foust, the latter appeals.

Gazan & Caldwell, of New York City, for appellant, Baxter N. Foust, as administrator, etc.

Tompkins, Boal & Tompkins and White & Case, all of New York City (Arthur M. Boal, Charles J. Fay, and Alfred W. Heuston, all of New York City, of counsel), for appellees.

AUGUSTUS N. HAND, Circuit Judge:

The debtor, Munson Steamship Line, on June 11, 1934, filed a petition for reorganization under section 77B of the Bankruptcy Act (11 U. S. C. A. § 207). On June 13, 1934, the District Court made an order approving the petition

and appointing Edward P. Farley and Morton L. Fearey temporary trustees and enjoining all persons "from instituting or prosecuting or continuing the prosecution of any action at law or action or proceeding in equity or admiralty or bankruptcy against the debtor or the trustees in any court of law or equity or admiralty or bankruptcy. * * *"

The appellant, Baxter N. Foust, as administrator, on February 1, 1934, brought an action against the Munson Steamship Line, under the Jones Act (46 U. S. C. A. § 688), to recover damages for the death of Coy E. Foust, a seaman employed on one of its steamers, which was alleged to have been caused by the negligence of the defendant in not providing the seaman with a safe place to work. On February 7, 1934, the defendant filed its answer.

On January 26, 1935, Baxter N. Foust, as administrator, made a motion before the District Court in the proceeding under section 77B for the modification of the restraining order so as to permit him to prosecute his claim. It was [fol. 79] stated in the moving affidavit that the Munson Steamship Line was covered by liability insurance, that any judgment recovered would have to be paid by the insurance company, and that, if the administrator should be allowed to obtain judgment in the pending action, he would then bring suit under section 109 of the Insurance Law of the state of New York (Consol. Laws, c. 28) for the satisfaction of the award. It was also alleged that under the Merchant Marine Act of 1920, 41 Stat. 988, and the Bankruptcy Act, as amended in 1934, the claimant was entitled to a trial by jury and that his claim was preferred.

The court made an order denying the motion to modify the order, as it had done in the cases of three other tort claimants, and provided that a special master should be appointed to hear and report as to the claim, if Foust should so desire. It is from that order that the present appeal was taken. We allowed the appeal upon the theory that the only question was whether the District Court had any power to stay the action and instructed counsel only to argue that point. Accordingly, we must determine whether there was power in the District Court to stay the action of Foust in the Supreme Court of New York.

In clause (c) (10) of section 77B (11 U. S. C. A. § 207 (c) (10) it is provided that, in addition to the power given by section 11 of the original Bankruptcy Act (11 U. S.

C. A. § 29) to grant stays of suits founded upon claims from which a discharge would be a release, the judge in the 77B proceeding "may enjoin or stay the commencement or continuation of suits against the debtor until after final decree." The power to grant stays in aid of a reorganization is thus far more sweeping than the power granted in ordinary cases of bankruptcy, and in Continental Illinois Nat. Bank v. Chicago, Rock Island R. Co., 294 U. S. 648, 55 S. Ct. 595, 79 L. Ed. 1110, the Supreme Court upheld a stay in the case of a railroad reorganization under section 77 (11 U. S. C. A. § 205) even where it was to prevent banks holding collateral notes from selling the collateral under the terms of their contracts.

But the claim of Foust as administrator is dischargeable in a 77B proceeding so that there was power to enjoin its prosecution not only under (c) (10) of 77B (11 U. S. C. A. § 207 (c) (10) but under section 11 of the original Bankruptcy Act (11 U. S. C. A. § 29). Section 77B (b) (10), 11 U. S. C. A. § 207 (b) (10) defines creditors as "all holders of claims of whatever character against the debtor or its property," and clause (h), 11 U. S. C. A. § 207 (h), provides that the final decree confirming the plan of reorganization "shall discharge the debtor from its debts and liabilities." It is apparent from this broad language of clauses (b) (10) and (h), supra, that a discharge of the debtor under a plan of reorganization is not dependent on whether the claim in question would be dischargeable in a strict bankruptcy proceeding but embraces liabilities of every kind whether fixed or contingent. Indeed, reorganizations would often be impracticable if the plans did not provide for a discharge of all liabilities and resumption of business left the debtor with tort liabilities which had not been adjudicated prior to the filing of the 77B petition. The words of clause (h) granting a discharge, not only from debts, but from "liabilities," and also the language of clause (c) (6), 11 U. S. C. A. § 207 (c) (6), which requires the judge to set a time within which the claims of stockholders as well as those of creditors shall be proved, make it plain that liabilities of every kind are to be discharged in a reorganization under section 77B. Subdivision (k), 11 U. S. C. A. § 207 (k), dealing with an order for liquidation of the estate, where a plan of reorganization has failed, and subdivision (o), 11 U. S. C. A. § 207 (o), making the provisions of the old Bank-

ruptcy Act generally applicable in 77B proceedings, are to be read with the limitations in clauses (b) (10), (c) (6) and (h), supra. In view of the foregoing, we hold that there was power in the District Court to stay the action by Foust.

At the time we allowed the appeal we thought that the only question to be considered was the power of the District Court to stay the action brought by Foust, but a perusal of the record upon this appeal leaves us with considerable doubt whether it was just to grant a stay against all proceedings in the action in the state court. As we have already said, the Munson Steamship Line was covered by liability insurance. Section 109 of the Insurance Law of [fol. 80] the state of New York requires that a liability policy shall contain a provision that "the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy."

Now the condition of liability of the insurance company under the policy will only be fulfilled if a judgment is recovered by the claimant and an execution thereon is returned unsatisfied. It is somewhat doubtful whether an order of the bankruptcy court allowing Foust's claim would be the equivalent of the execution required by section 109 of the Insurance Law, for an execution never issues out of that court, at least in a literal sense. But, even if an order of the bankruptcy court allowing the claim could be said to be the equivalent of an execution, the question would arise whether Foust, after receiving from the Munson Steamship Line whatever dividend might be paid him under the plan of reorganization, would be able to recover the balance of his claim from the carrier to the extent that such balance, plus what he had received as a dividend, did not exceed the face of the policy. This would depend on whether the words "returned unsatified" in section 109 not only mean

"wholly" but also "partially unsatisfied." The latter meaning of "unsatisfied" would subject the carrier to two actions, one by the insured Munson Line to recover the dividend paid and the other by Foust for any balance not in excess of the policy. It may be argued with some, though not altogether convincing, force that such twofold causes of action are not authorized by section 109. It would probably simplify matters to allow the action in the state court to proceed. If Foust should recover judgment in that action, the execution would be returned "unsatisfied," and he then could proceed to collect his whole claim from the carrier by direct suit pursuant to section 109. But it is common experience that jurors often return far larger verdicts in negligence actions than reason justifies. The trustees of the debtor have a pefect right to take this into account and not to accede to a method for the liquidation of the tort claims that is unusual in bankruptcy unless the ordinary method of proof before a special master would imperil the claimant's rights. If Foust is willing to stipulate not to use any judgment he may recover in the state action as a claim against the estate, there could be no objection to allowing that action to proceed to judgment. It may be argued that such a stipulation would endanger his rights against the carrier, but it is hard to see how it could if the execution was returned wholly unsatisfied. Such a return would create a direct liability to Foust on the part of the carrier. The latter would, however, in no event be compelled to pay more than the amount of the damages for the death of Foust's decedent so far as that amount did not exceed the face of the policy.

Although the order allowing this appeal was in general terms, none of the problems we have suggested has been discussed, because we said in our per curiam opinion that only the power to grant a stay would be considered. The appeal should not be finally determined without giving the parties a chance to present their views as to whether the District Court ought not to allow the state court action to proceed to judgment. There would be no occasion to do this if the appellant Foust is willing to stipulate not to use any judgment recovered in his favor as a claim against the debtor's estate. But, if such a stipulation is not filed by the appellant within three days, supplemental briefs shall be filed within ten days thereafter relating to the propriety of the exercise of the

judicial discretion of the District Court, whereupon we shall determine whether the stay ought to stand in the absolute form in which it was granted.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the United States Court House in the City of New York, on the 13th day of January, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of MUNSON STEAMSHIP LINE, Debtor; BAXTER N. FOUST, as Administrator, etc., Appellant

This cause having come on to be heard on the transcript of Record from the District Court of the United States for the Southern District of New York, it is

Ordered that if the Plaintiff within three days from the entry of this order stipulates not to use any judgment recovered in his favor in his action against the Munson Steamship Line as a claim against the debtor's estate, the order appealed from be reversed. But if the plaintiff fails to file such stipulation, supplemental briefs shall be filed within ten days thereafter, relating to the propriety of the exercise of the judicial discretion of the District Court, and thereupon the cause shall stand for determination on such briefs.

Wm. Parkin, Clerk.

[fol. 82] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Munson Steamship Line. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 13, 1936. William Parkin, Clerk.

[fol. 83] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued Oct. 23, 1935. Decided Feb. 10, 1936

No. 77

In the Matter of MUNSON STEAMSHIP LINE, Debtor

Ex parte BAXTER N. FOUST, as Administrator of COY E. FOUST, Deceased, Appellant

v.

MUNSON STEAMSHIP LINE and EDWARD P. FARLEY and MORTON L. FEAREY, Trustees, Appellees

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

On Further Rehearing

Per CURIAM:

The appellant's additional brief states that he is unwilling to stipulate that he will not use any judgment, that might be secured in the state court, to prove his claim as administrator against the estate of the debtor. One of the reasons he gives for not so stipulating is that the liability policy contains a deductible clause whereby the insured Munson Steamship Line became self-insurer for the first $2,500 of the claim and "as the value of the Foust claim is not over $5,000 such stipulation would mean that the administrator would relinquish a substantial part of his claim."

In view of the refusal of the appellant to stipulate as above, we must determine whether the District Judge abused his discretion in enjoining the claimant from liquidating his claim in the state court. As the estate of the debtor had a substantial interest in the amount of the recovery, the judge in charge of the section 77B (11 U. S. C. A. § 207) proceeding did not abuse his discretion in promoting that interest and in adopting the mode of liquidating the claim which he selected. That mode was more convenient and expeditious than any other and was plainly an advan-

tage to the estate. If the claim had been fully covered by the insurance so that the carrier was primarily liable for the entire damage, we might have reached a different conclusion; but, under the circumstances, we think the determination of the court below was justified.

Order affirmed.

[fol. 84] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the United States Court House in the City of New York, on the 17th day of February, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of MUNSON STEAMSHIP LINE, Debtor; BAXTER N. FOUST, as Administrator, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 85] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In Re Munson Steamship Line. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 17, 1936. William Parkin, Clerk.

[fol. 86] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify

that the foregoing pages, numbered from 1 to 85, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Munson Steamship Line, Debtor; Baxter N. Foust, as Administrator, etc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-third day of March, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 27, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,431. U. S. Circuit Court of Appeals, Second Circuit. Term No. 19. Baxter N. Foust, Administrator, etc., petitioner, vs. Munson Steamship Lines, Debtor in Reorganization. Petition for a writ of certiorari and exhibit thereto. Filed March 30, 1936. Term No. 19, O. T., 1936.